SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of Gerald J. Garner,
a suspended attorney and counselor-at-law,

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,

Petitioner,

GERALD J. GARNER,

Respondent.

REPORT OF REFEREE,
W. BERNARD RICHLAND

Gary L. Cassella,
Chief Counsel, Grievance Committee, Petitioner
by Sondra S. Holt,
Of Counsel

Morrison & Foerster, Attorneys for Respondent,
by Barrington D. Parker, Jr.,
Of Counsel

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REPORT OF REFEREE

W. BERNARD RICHLAND, Referee—

By order dated February 1, 1991, the Court designated the undersigned as a successor Special Referee "to hear and report" in a proceeding to discipline Respondent who was admitted to practice as an attorney and counselor at law by the Court on March 29, 1961. The Special Referee originally designated was relieved on his request when he became a Justice of the Supreme Court. The subject matter of the proceeding is two

charges of professional misconduct, each of which will be considered separately.

Before that, a special note:

A TROUBLESOME ASPECT OF THIS PROCEEDING

In this proceeding, a straightforward question of fact has transformed a 1-year suspension ordered by this court into—to this date—an almost 7 year suspension. It has engaged the efforts of three major law firms and, as counsel, a former Justice of this Court, two special referees and the staff of the Grievance Committee; all in what might appear to be an improvident use of judicial attention and legal energy and talent—particularly since respondent's present counsel noted at one stage in the hearings before the predecessor Special Referee, "Mr. Garner is a suspended attorney. He is not living or residing here, he is not practicing law in this or any other jurisdiction. As I understand it, he has really no intention of returning to New York or of reapplying." (43)[1] This proceeding, it is recommended, should be brought to a prompt conclusion.

The Proceeding

(1)

By order dated October 1, 1984, this Court found respondent "guilty of serious professional misconduct" *Matter of Garner*, 103 AD 2d 390 (1984), and suspended him from the practice of law "for a period of one year, commencing November 1, 1984, and continuing until the further order of this Court, with leave to respondent to apply for reinstatement after said period of one year." (Pet'r Exh. 6).

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1 Reference to Minutes of Hearing.

(2)

The proceeding which resulted in the suspension order was instituted by the Grievance Committee by petition verified March 31, 1981 and served on respondent April 15, 1981 (Pet'r Exh. 1). That petition was amended by Amended Petition verified July 2, 1981 and served on respondent August 12, 1981 (Pet'r Exh. 3). The Amended Petition set forth ten charges, five of which were later withdrawn. Hon. Aaron Kooter, the Special Referee appointed by the Court to hear and report on the charges, filed his report with the Court dated January 25, 1984, sustaining only a portion of one charge and one entire charge—all relating to a single transaction in regard to an infant adoption which took place in California. (Pet'r Exh. 5).

(3)

While the Grievance Committee proceeding was going on, respondent, who had moved to California, was involved in the organization of the American Commerce National Bank, to be located in Anaheim Hills, California, and applied to the Office of the United States Comptroller of the Currency (hereinafter "O.C.C.") for approval as "organizer" and "director" of the proposed National Bank, in connection with which the matter he submitted a "Confidential Biographical and Financial Report", dated June 30, 1983. (Pet'r Exh. 7).

That report contained the following under Part A, section 4, (d) (*Id.* at page 6):

> "(d). Provide the following information regarding each disciplinary proceeding or action of which you are, or have been, the subject, with respect to any professional license you hold or have held. Examples: Disbarment, censure of conduct, revocation of license, etc.
>
> | *Name of Authority* | *Nature of Proceedings* | *Disposition and Date* |
> |---|---|---|
>
> NONE—except for nominal fee disputes inquires and a 1975 question of whether or not there was a violation of compact law, all of which have resulted in no action."

(4)

By letter to O.C.C. in connection with an application to add to his status in the Bank dated September 24, 1984, respondent submitted a purportedly "re-dated and resigned biography" (attached to Pet'r Exh. 9A) in which xeroxed signature page 14 of Pet'r Exh. 7 was amended in handwriting by respondent, "resigned and up to date 9/23/84;" and xeroxed page 1 of Pet'r Exh. 7 was amended delete the "X" from the word "Organizer" and insert an "X" in the space for "officer." Page 6, item d of Exh. 9A is not identical with page 6, item d of Pet'r Exh. 7 quoted above; the entire text of the response in item d in Exhs. 9, 9A and 14 is, "NONE," the qualifying language, "except for" etc. is omitted.

(5)

On November 12, 1985, a Senior Attorney in the Securities and Practice Division of O.C.C. telephoned the Office of the Grievance Committee and spoke to an Assistant Counsel. He apparently had come across the 1984 decision of this Court suspending respondent, reported in *Matter of Gerald J. Garner*, 480 N.Y.S.2d 127, and asked to see the record on the basis of which the suspension was ordered. (Resp. Exh. F).

Apparently, because of what the Assistant Counsel learned in that conversation, the Grievance Committee "opened a sua sponte complaint in December of 1985 against the respondent based on the filings with the Comptroller of the Currency," but was unable to prepare a formal petition in disciplinary proceedings until April, 1988, because respondent said he did not have copies of the "filings," that is, "documents submitted . . . by Mr. Garner in connection with his application for a [bank] charter . . . which contained false information," and the O.C.C. did not release such copies until May, 1987 (45-46, and Resp. Exh's. G, H and I).

The Petition and Answer

The Petition, verified April 4, 1988, was served on respondent May 26, 1988. An unverified answer dated August 19, 1988 was, on that date, *served on petitioner.*

The petition asserted that, in two separate instances, respondent was guilty of filing a false written statement. In each charge, petitioner alleged the earlier 1983 disciplinary proceedings, its origin, development, hearings, Referee's report, and decision of the Court suspending respondent.

In Charge I, the petitioner alleged that, in a "Confidential Biographical and Financial Report" dated June 30, 1983, submitted to the U.S. Comptroller of the Currency, respondent falsely made the answer set forth in item 3 of The Proceeding, supra at pp. 3-4, and that he knew or should have known that it was false, thereby violating Disciplinary Rule 1-102 A(4) and (6).

In Charge II, the petitioner alleged that in a "Confidential Biographical and Financial Report" dated September 23, 1984, submitted to the U.S. Comptroller of the Currency, respondent falsely made the answer set forth in item 4 of The Proceeding, supra at p. 4, and that he knew or should have known that it was false, thereby violating Disciplinary Rule 1-102 A(4) and (6).

The unverified Answer denied the conclusionary allegations and denied knowledge or information sufficient to form a belief as to the allegations that the identified "Confidential" etc. "Reports" were submitted by him to the O.C.C., and admitted the 1981 disciplinary proceeding and his one-year suspension from the practice of law.

PRIMA FACIE PROOF OF THE CHARGES

The "Confidential Biographical and Financial Reports" admittedly submitted by respondent to the office of the United States Comptroller of the Currency and the uncontroverted record of the 1981 disciplinary proceeding, taken together, constitute *prima facie* proof of Charge I and, *a fortiori*, Charge II.

CHARGE II

We first address Charge II, which relates to a flat answer "NONE" to a request for information in regard to any "disciplinary proceeding" in which respondent was or had been "subject in respect to any professional license you hold" *Pet'r Exh. 9, Part A, Section 4, (d), at p. 6.*

Plainly, there was and had been a "disciplinary proceeding" of which respondent had been "the subject." Indeed, that proceeding had been on since 1981, it related to a series of significant charges of professional misconduct, there had been hearings over several days before a Special Referee who had then filed his Report to this Court and a copy of it was in respondent's hands. That Report found respondent guilty of some of the charges and the Report was under consideration by this Court at the time when that "Confidential" etc., "Report" was submitted to the United States Comptroller of the Currency by Respondent in September, 1984. "Biographical and Financial Reports" substantially identical to Pet'r Exh. 9 were then submitted to two Field Offices of the Comptroller of the Currency (Pet'r Exh. 9A and Pet'r Exh. 14).

The response "NONE" to Part A, Section 4 (d) in each of the "Confidential and Biographical and Financial Reports", Pet'r Exhibits 9, 9A, and 14, is false, and those Reports were submitted to a United States Government Agency in connection with the establishment and the operation of a National Bank.

CHARGE I

Charge I relates to Part A, section 4, (d) of the "Confidential Biographical and Financial Report" submitted to the Comptroller of the Currency in June, 1983 and is set forth in subdivision 3 of The Proceeding, *supra*. In response to request for information in regard to any "disciplinary proceeding" in which "you are or have been the subject in respect to any professional license you hold" (Pet'r Exh. 7 at page 6), respondent answered "NONE—except for nominal fee disputes inquiries and a 1975 question of whether or not there was a violation of a compact law, all of which have resulted in no action."

Although at the time respondent submitted the "Confidential Biographical and Financial Report," there was and had been pending against him for more than two years an attorney "disciplinary proceeding" in which respondent was and had been "subject in respect" to his "professional license" as an attorney, he answered "NONE–except," made no reference to the "Nature of Proceedings" in which he was involved, and, after making an unenlightening description "nominal fee disputes inquiries" and, similarly unenlightening, "question of whether or not there was a violation of a compact law," stated "all of which has resulted in no action," when in fact there had been a great deal of "action" in an ongoing "disciplinary proceeding" and a Special Referee had submitted a Report to this Court finding him guilty of professional misconduct.

The response by respondent to the request for information in Part A, Section 4, (d) of the "Confidential" etc. "Report" made to a United States regulatory agency in connection with the establishment of a National Bank, was so lacking in candor, so arch and unenlightening as to amount to misleading and grossly inaccurate.

Legal and Factual Defense

(a)

Respondent offers as a legal defense to the Charges that he was not required to disclose the 1981 disciplinary proceeding because under Judiciary Law section 90, subd. 10, it was sealed and deemed confidential. (Respondent's Post-Trial Memorandum Point I) But respondent claims that he disclosed the pending disciplinary proceeding by his grossly misleading answer in the 1983 "Confidential" etc. "Report" and flatly and falsely denied the existence of any disciplinary proceeding in the 1984 "Confidentially" etc. "Report." Judiciary Law section 90, subd. 10, does not grant an attorney a license to mislead, falsify and lie.

(b)

Respondent offers as a legal defense to the Charges that because an employee of the Office of the Comptroller of the Currency,

called as a witness, refused to go beyond the extent to which the Comptroller of the Currency authorized him to respond to the Subpoena Duce Tecum served on that office (121-123), the O.C.C. as a Federal agency being not subject to the State Court Subpoena, *Sharon* v. *F.E.R.C.*, 691 F.Supp. 381 (1988), and cases therein cited.

Significantly, respondent made no objections to the receipt in evidence of the certified copies of relevant "Confidential" etc. "Reports" which the witness produced (91, 94, 96) and which support the charges. Nevertheless, he asks that they be excluded.

(c)

Respondent offers as justification for the false and misleading statements contained in the "Confidential" etc. "Reports" submitted by him to the Office of the Comptroller of the Currency in connection with the organization and operation of a National Bank, that he did so on advice of his long-dead counsel. He testified that in 1983 he discussed the "Confidential" etc. "Reports" (Pet'r Exh) with his counsel who advised him that the "appropriate answer" to the request for information as to any "disciplinary proceeding . . . of which you are or have been subject with respect to any professional license you hold" was "NONE" but that he should send him the question "so he could inspect it" (223-24). And, "I sent him the whole confidential report . . . finally, several days after . . . he called back to my secretary and said that to tell me that the 'NONE' was the appropriate answer" (224).

We have long been taught to be most dubious of the accuracy of statements attributed to a person who is no longer alive, (2 Wigmore, Evidence section 578 and old CPA section 347 and 5 Weinstein Korn & Miller *New York Civil Practice*, p.p. 45-451 to 45-461), and the late Erwin Shapiro, a former Justice of this Court is the lawyer who supposedly gave respondent that peculiar advice. Significantly, Mr. Shapiro cautioned that he would have to see the document—the "Confidential" etc. "Reports"—before making up his mind, and respondent did not hear from Mr. Shapiro himself on the matter, but said he relied upon what his secretary said she had been told by Mr. Shapiro. Moreover, respondent him-

self had some reservations on the correctness of the "NONE" response: "I was not totally comfortable with adding 'NONE' and a dictation followed with my secretary where these additional words were put in" (224-25). And, "I would like to add a little more information. I am not comfortable with just putting in 'NONE' " (171).

The 1983 feeling of discomfort "with just putting in 'NONE' " seems to have moderated by 1984 when respondent filed the "re-dated and re-signed" "Confidential" etc. "Reports" in which the flat answer "NONE" appears in response to a request for information on any "disciplinary proceeding . . . of which you are or have been subject in respect to any professional license you hold." But in this regard, respondent testified that he really did not intend to delete the additional text after the word "NONE" (249). "Somebody took out everything after 'NONE' " (251). But there are three 1984 "Confidential Biographical . . . Reports," not identical with each other in several minor respects, but each giving the flat answer "NONE" to the "disciplinary proceeding" information request. (Pet'r Exhs. 9, 94, 14)

Matter in Mitigation

This Court, in *Matter of Garner*, 103 AD 2d 390, wrote of respondent's "impressive record of past and present community activities and ample evidence of good character." And, respondent has continued in that regard over the years since that decision.

There is also another aspect which may be considered by this Court in making its decision: the very significant fact that the Comptroller of the Currency has not found the circumstances which led to the present charges of sufficient gravity to offset respondent's character and quality to be the chief executive office of what has grown to be a significant and successful National Bank. And under his leadership.

Moreover, as noted at the outset, respondent's one year suspension from practice imposed by this court has grown—so far—to almost seven years. Whether respondent shares with petitioner responsibility for this unfortunate fact is of limited significance. The lengthy suspension has already imposed great hardship on

respondent and vastly extended the punishment imposed by this court without its knowledge or consent.

CONCLUSION

The Charges are sustained.

Respectfully submitted.

/s/ W. BERNARD RICHLAND
W. Bernard Richland,
Referee

July, 1991

State of New York
Grievance Committee for the
Ninth Judicial District
Crosswest Office Center
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CONFIDENTIAL December 13, 1990

Donald Lamson, Esq.
Director
Securities & Corporate Practices
Division
Office of the Comptroller of the
Currency
490 L'Enfant Plaza S.W.
Washington, D.C. 20219

Re: Gerald J. Garner

Dear Mr. Lamson:

This Committee had previously been provided with certified copies of two filings made by Mr. Garner, one in 1983 and one in 1984, in which he sought approval to become director, and later, Chief Executive Officer of a National Bank in Anaheim, California. These certified copies were provided to the Committee, after our formal request for them, to be used in a Disciplinary Hearing regarding Mr. Garner's license to practice law in New York. The gravamen of the charges pending against Mr. Garner is that he submitted false answers to the O.C.C. in two Confidential Biographical and Financial Reports in which he maintained that he was not, and had not been, the subject of any disciplinary proceeding, when in fact he was.

These certified copies were irreparably damaged in a recent fire in the Committee's offices. Prior to the fire, I was directed by the Judge in this case to contact the O.C.C. regarding a discrepancy between the signature page on an uncertified copy of the 1984 filing and the certified copy of the same document. As a result of my inquiry, I have learned that the O.C.C. was in possession of more than one copy of the 1984 filing.

Please consider this letter the Committee's formal request to you to provide us with certified copies of both filings and of all correspondence , notes, memoranda etc., pertaining to Mr. Garner's applications to the O.C.C. with reference to the American Commerce National Bank of Anaheim, California. Additionally, we are formally requesting your office to provide us with a witness, preferably yourself, who could explain the circumstances surrounding the existence of two copies of Mr. Garner's 1984 filing and the differences between the two, as well as testimony on the procedures for seeking approval from the O.C.C to be a director or C.E.O. of a national bank, and the documentation involved in such an application.

Since a question has been raised as to the authenticity of the 1984 documents by Mr. Garner's attorney, the testimony of one who is familiar with the O.C.C's procedures is essential in establishing these documents as credible evidence in our case. The information to be provided in this testimony is unavailable from any other source, and written explanations would not be competent evidence under the rules against hearsay.

We anticipate the hearing to be rescheduled sometime after the beginning of January, 1991. I am grateful for your consideration of this request and hope that you will be able to comply.

Very truly yours,

S/

Sondra S. Holt
Associate Counsel

SSH/lr
0556e

MORRISON & FOERSTER
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April 10, 1991

CONFIDENTIAL

BY TELEFAX AND MAIL

James Gillespie, Esq.
Assistant Director of Litigation
Office of the Comptroller of the Currency
490 L'Enfant Plaza
Washington, D.C. 20219

Re: In re Gerald J. Garner,
(N.Y. App. Div., 2d Dep't)

Dear Jeff:

On November 7, 1990, we served a subpoena duces tecum issued by the New York State Appellate Division for the Second Department upon the Office of the Comptroller of Currency ("OCC") on behalf of our client, Gerald J. Garner, the respondent in an attorney grievance proceeding now underway before that Court. A hearing in this matter is now outstanding and we expect compliance at or before the hearing.

Sincerely yours,
S/
David Z. Seide

DZS: cd
cc: Mr. Donald Lamson